

**Objection to Determination that Farm is Confined Feeding Operation, Submitted by Samuel L. Lantz,
2819 North Henry County Line Road, Cambridge City, Wayne County, Indiana.**

**Samuel L. Lantz: Petitioner;
Eric and Lisa Stickdorn: Intervenors;
Indiana Department of Environmental Management: Respondents.
2007 OEA 106 (04-S-J-3458)**

OFFICIAL SHORT CITATION NAME: When referring to 2007 OEA 106, cite this case as
Samuel L. Lantz CFO Objection, 2007 OEA 106.

TOPICS:

Confined Feeding Operation
CFO
Motion to Dismiss
intervention
Agreed Order
legal duty
subsequent owner
reportable spill
Waters of Indiana
moot
great public interest

PRESIDING JUDGE:

Davidsen

PARTY REPRESENTATIVES:

Petitioner: Samuel L. Lantz: *pro se*
Intervenors: Eric and Lisa Stickdorn: *pro se*
IDEM: Nancy A. Holloran, Esq

ORDER ISSUED:

June 28, 2007

CATEGORY INDEX:

Land

FURTHER CASE HISTORY:

[none]

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Findings of Fact

1. On October 4, 2004, the Indiana Department of Environmental Management (“IDEM”) requested that Samuel L. Lantz (Petitioner Lantz) submit an application for potential Confined Feeding Operation (“CFO”) approval of Petitioner Lantz’s dairy operation located at 2819 North Henry County Line Road, Cambridge City, Wayne County, Indiana.
2. IDEM’s October 4, 2004 request for CFO application was based upon two (2) unpermitted discharges of manure or wastewater from Petitioner Lantz’s dairy activities into Waters of the State of Indiana, as indicated in Ind. Code § 13-11-2-40(3) and 327 IAC 16-2-5(3). IDEM’s October 4, 2004 Request for CFO application was not based upon the quantity of animals at the site.
3. On October 20, 2004, Petitioner Lantz timely filed his Petition for Administrative Review of IDEM’s October 4, 2004 request for CFO application. Petitioner Lantz filed a November 27, 2004 Supplement to his Petition, as ordered by the Court.
4. On March 2, 2005, the Court issued an order granting Eric and Lisa Stickdorn’s petition for intervention. Intervenors Stickdorn lived on residential land they owned adjacent to Petitioner Lantz’s dairy farm. Intervenors Stickdorn had received copies of Court orders since December 3, 2004, per their prior requests. During the litigation of this cause, Intervenors were represented by Eric Stickdorn, who represented that he and Lisa Stickdorn jointly owned their residential property as husband and wife. Neither Lisa Stickdorn nor any other party objected to Eric Stickdorn’s representation of Intervenors’ interests in this case.
5. On April 13, 2005, Petitioner Lantz and IDEM’s Office of Enforcement entered into an Agreed Order. The Agreed Order was not made pursuant to an order of this Court. The Agreed Order provided mitigation required for the two (2) unpermitted discharges of manure or wastewater from Petitioner Lantz’s dairy operations into Waters of the State of Indiana.
6. The Agreed Order, part II, provided:
 - Item 6: Should the Respondent (Petitioner Lantz) decide to repopulate the site, the Respondent shall apply for and receive a confined feeding operation approval prior to repopulating and resuming milking operations.

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- Item 11: This Agreed Order shall apply to and be binding upon the Respondent, its successors and assigns. The Respondent's signatories to this Agreed Order certify that they are fully authorized to execute this document and legally bind the parties they represent. No change in ownership, corporate, or partnership status of the Respondent shall in any way alter its status or responsibilities under this Agreed Order.
7. On April 14, 2005, Petitioner Lantz filed a letter with the Court, stating Petitioner Lantz' voluntary withdrawal of his Petition for Administrative Review. Petitioner Lantz stated that he had sold the property at issue to Mr. Elam Zook, and retained no ownership rights over the site.
 8. No evidence was presented that Petitioner Lantz had any legal duty, relationship or control over Mr. Zook's use of the dairy farm site at 2819 North Henry County Line Road, Cambridge City, IN, after Petitioner Lantz sold the property at issue.
 9. Mr. Elam Zook is not a party to this cause, nor did any party seek to join Mr. Zook as a party to this cause.
 10. On August 5, 2005, representatives of IDEM's Office of Land Quality inspected the former Lantz dairy farm site at 2819 North Henry County Line Road, Cambridge City, IN.
 11. Based upon their August 5, 2005 inspection, IDEM's inspectors determined that Petitioner Lantz was in compliance with the April 13, 2005 Agreed Order.
 12. On September 14, 2005, IDEM issued a final determination letter to Petitioner Lantz, withdrawing the October 4, 2004 request that Petitioner Lantz apply for CFO approval.
 13. IDEM never determined or classified the former Lantz property at 2819 North Henry County Line Road, Cambridge City, IN as a confined feeding operation.
 14. At the July 27, 2006 oral argument, Intervenor Stickdorn requested that this matter proceed to mediation, involving Petitioner Lantz and Intervenors. Petitioner Lantz and Intervenors proceeded to mediation. On October 2, 2006, mediator Stephen L. Lucas submitted notice to the Court that mediation was not successful as the parties were at impasse.

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Conclusions of Law

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC § 4-21.5-7-3.
2. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). “*De novo* review” means that:

all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.

Grisell v. Consol. City of Indianapolis, 425 N.E.2d 247 (Ind.Ct.App. 1981).
4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envntl. Adjud.*, 811 N.E.2d 806, 809 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit); *see also* Ind. Code § 4-21.5-3-27(d). While the parties’ evidence disputed whether IDEM’s determination on the resubmitted claims complied with Ind. Code § 13-23-9-2, OEA is authorized “to make a determination from the affidavits . . . pleadings or evidence.” Ind. Code § 4-21.5-3-23(b). “Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test.” *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47*, 2004 OEA at 129. *See also Blue River Valley*, 2005 OEA at 11, 12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338)*, 2005 OEA 26, 41.
5. The Indiana legislature has delegated statutory authority to implement and regulate Indiana’s Confined Feeding Program to IDEM.

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6. The IDEM argues that its September 14, 2005 final determination letter, withdrawing the October 4, 2004 request that Petitioner Lantz apply for CFO approval, renders this case moot and, therefore, it should be dismissed. “When a dispositive issue in a case has been resolved in such a way as to render it unnecessary to decide the question involved, the case will be dismissed.” *Travelers Indem. Co. v. P.R. Mallory & Co.*, 772 NE.2d 479, 484 (Ind. App. 2002). A case is deemed moot when there is no effective relief that can be rendered to the parties by the Court. *A.D. v. State*, 736 N.E.2d 1274, 1276 (Ind. Ct. App. 2000); *Petition for Review of NPDES, Permit No. IN002560, City of Terre Haute, Wastewater Treatment Plant, Vigo County*. 2007 OEA 1 (05-W-J-3551).
7. Intervenors Stickdorn argue that this matter is not moot and should not be dismissed, for numerous reasons cited in their briefs and submissions to the Court. One reason within this Court’s jurisdiction is dispositive, therefore the other arguments will not be addressed. The argument which the Court will address is stated in items 6 and 11, part II of the April 13, 2005 Agreed Order.
8. Intervenors Stickdorn seek application of the Agreed Order to apply to the real estate. Under Intervenors’ theory, once regulated spills occurred and IDEM made its determination that the site should be a CFO, the site should remain a CFO so long as applicable activities occur on the site, regardless of site ownership. Under applicable Indiana law, and the terms of the Agreed Order, these duties unambiguously apply to a party (here, Petitioner Lantz), and not to the real estate in controversy. IC § 13-11-2-40(3) and 327 IAC 16-2-5(3).
9. Item 6’s requirement that should the “Respondent (Petitioner Lantz) decide to repopulate the site, the Respondent shall apply for and receive a confined feeding operation approval prior to repopulating and resuming milking operations” does not apply in this instance to maintain the site as a CFO. No evidence was presented that Petitioner Lantz had repopulated the site.
10. Item 11 provides, “This Agreed Order shall apply to and be binding upon the Respondent, its successors and assigns. The Respondent’s signatories to this Agreed Order certify that they are fully authorized to execute this document and legally bind the parties they represent. No change in ownership, corporate, or partnership status of the Respondent shall in any way alter its status or responsibilities under this Agreed Order.
11. It is undisputed that Petitioner Lantz has changed as owner of the site since the Agreed Order was executed. No evidence was provided that Petitioner Lantz retains any legal right, duty, or authority to control the site’s current owner, Mr. Elam B. Zook. No evidence was presented that Petitioner Lantz acted in violation of the Agreed Order on the site after ownership rights were transferred to Mr. Zook. Substantial evidence does not support a finding that Petitioner Lantz violated the April 13, 2005 Agreed Order so as to allow this Court to retain jurisdiction over the parties and controversy.

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12. IDEM's October 4, 2004 request that Petitioner Lantz apply for a CFO was withdrawn, and Petitioner Lantz withdrew his Petition for Administrative Review on April 14, 2005. The dispositive issue in this case is whether IDEM was correct in requesting that Petitioner Lantz apply for CFO approval at 2819 North Henry County Line Road, Cambridge City, IN. The dispositive issue in this case has been resolved in such a way as to render it unnecessary to decide the question involved. This case should be dismissed as moot.
13. The remedies sought by Intervenors Stickdorn are in excess of this Court's authority, and there is no effective relief that can be rendered to the parties by the Court. This case is moot and should be dismissed.
14. This Court "may decide an arguably moot case on its merits if it involves questions of great public interest." *Id.* "Cases that fit within this exception typically are those containing issues that are likely to recur." *Id.* Indiana's courts have determined that the likelihood of recurrence was sufficient to overcome a challenge for mootness in the review of a three-month commitment at a juvenile correctional facility in *A.D. v. State*, supra.; hardship restrictions on a temporarily-suspended driver's license in *Gibson v. Hernandez*, 764 N.E.2d 984 (Ind.Ct.App. 2002); a case management order enjoining litigation in another forum in *Traveler's Indem, Co.*, supra.; a county's practice of not correcting forwarding addresses on property tax delinquency notices in *McBain v. Hamilton County*, 744 N.E.2d 984 (Ind.Ct.App. 2001), trans. den.; competitive bidding process challenged by taxpayers after bid contract had been completed in *Irwin R. Evens & Sons, Inc. v. Board of Airport Authority*, 584 N.E.2d 576 (Ind.Ct.App. 1992); a family's right to determine an incompetent family member's withdrawal of nutrition and hydration in *Matter of Sue Ann Lawrence*, 579 N.E.2d 32, 37 (Ind. 1991); emergency injunction sought in statutory application of fish and game regulations concerning gill net fishing brought by fishing interest group and restaurant in *Ridenour v. Furness*, 514 N.E.2d 273, 274-275 (Ind. 1987); violations of statutory "status quo" provisions in school collective bargaining in *Indiana Educ. Employment Relations Bd. V. Mill Creek Classroom Teacher's Ass'n*, 456 N.E.2d 709, 711-712 (Ind. 1983); mandate to school trustees to grant transfer of students from one school to another in *State ex rel. Smitherman v. Davis*, 238 Ind. 563, 151 N.E.2d 495 (1958); see also *City of Terre Haute*, 2007 OEA 1.
15. After examining the facts of this case and based on the ELJ's experience in the environmental field and, in particular, her knowledge of issues previously raised before the OEA, the ELJ concludes that this factual situation and issue is not likely to recur and therefore, is not a matter of "great public interest".
16. This matter is moot and should be dismissed.

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Final Order

AND THE COURT, being duly advised, **ORDERS, ADJUDGES AND DECREES** that the Indiana Department of Environmental Management's Motion to Dismiss is **GRANTED**, and that this matter is **DISMISSED**.

You are hereby further notified that pursuant to provisions of IND. CODE § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED in Indianapolis, Indiana this 28th day of June, 2007.

Hon. Mary L. Davidsen
Chief Environmental Law Judge